

Norms for Assassination by Remotely Piloted Vehicle

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Abstract

This article briefly summarizes what is known about the formation and revision of norms⁵⁹ and applies that knowledge to the ongoing process of norm formation in the United States with regard to remotely piloted vehicles as they are currently being used for assassination⁶⁰. It focuses particularly on the use of drones in Afghanistan, but its arguments apply to their use in places like Yemen, Somalia, and Libya as well. It recommends distinguishing between the military's and the CIA's drone programs, finds that the military's program is far more in line with American norms and argues that the CIA's program should be terminated or brought into line with those norms.



Since Michael Walzer published *Just and Unjust Wars* in 1977, argument regarding ethics in international affairs has taken account of the idea that norms are formed through discourse among authors, ministers, editors, professors, politicians, and, as he put it, "publicists of all kinds."⁶¹ Scholarly attention to the importance and function of public discourse in norm formation has grown over the intervening decades. More recently, a number of scholars including Ward Thomas, Jeffrey Legro, Robert Price⁶² and Stephen Krasner⁶³ have established that norms in international relations, particularly norms regarding the use of force, are "products of political processes."⁶⁴ They argue that norms are developed and propagated because they express a moral conviction but also because they offer the individuals, organizations and states that adopt them important elements of political advantage. In this sense norms are "politically constructed."⁶⁵

The political construction of norms and rules systems has been recognized for some time. In the same year that Michael Walzer published *Just and Unjust Wars*, Hedley Bull wrote in *The Anarchical Society* that "any historical system of rules will be found to serve the interests of the ruling or dominant elements of society more adequately than it serves the interests of the others."⁶⁶

⁵⁹ The term "norms" will be used in this paper in the simple and common sense fashion that Legro recommends, that is as "collective understandings of the proper behavior of actors." (See Jeffrey Legro, "Which Norms Matter? Revisiting the 'Failure' of Internationalism in World War II", *International Organization* 51:1 (Winter 1997).

⁶⁰ Assassination is the killing of an individual by surprise attack, often treacherously and often out of political or religious motives. This article employs the term "assassination" rather than the more recent term "targeted killing" because the substitution of a new term severs the concept from the discourse which has long surrounded it. This article aligns with current scholarship on norms that argues that it is through discourse that norms are formed and revised. Therefore discourse ought not be distorted by the substitution of new and anodyne terms that strip a concept of important historical and social associations. This point is famously made by George Orwell in his essay "Politics and the English Language."

⁶¹ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) page 14.

⁶² Richard Price, "A Genealogy of the Chemical Weapons Taboo," *International Organization* 49, no. 1 (Winter 1995.)

⁶³ Stephen Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983.)

⁶⁴ Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Ithaca: Cornell University Press, 1983) chapter 2.

⁶⁵ Ward Thomas, 2001, page 30.

⁶⁶ Hedley Bull, *The Anarchical Society* (New York, Columbia University Press, 1977) page 55, quoted in Ward Thomas, *The Ethics of Destruction*, page 30. For an example of politically constructed norms, Bull looked to Michael Howard and

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None of these scholars argues that norms are purely pragmatic and reflect nothing more than political factors. Norms, as Thomas, Legro, Price, Krasner, McElroy⁶⁷ and others demonstrate, derive from values and widely held moral intuitions. They would add, however, that political, social and cultural interests play a crucial role as intervening factors in norms' development. Norms, Thomas finds, "typically comprise two strands: one based upon *a priori* moral principles, and the other grounded in more historically contingent cultural and geographical factors."⁶⁸ That second strand often reflects political interests defined in terms of power and may be thought of as the "power function" of the norm.

Norms for American use of air power historically have conformed to these principles. In World War II the strand based on *a priori* moral principles was subdued by the exigencies of war, as is commonly the case during wartime in all cultures. Wars bring distortions to the "collective expectations of proper behavior of actors" (as we have defined norms) and these distortions arise from the inflamed public passions of wartime, a perceived degree of necessity that trumps a previously established norm, the practice of secrecy which can decrease visibility, and the sense that the enemy's crimes justify any action of our own. Once a war ends there is often a "reset" as the moral impulse at the root of societal norms reemerges from under the factors that had overlaid it.

Such distortion is evident in the public discourse surrounding a massive air attack on Tokyo in early March 1945. The front-page article in the New York Times describing the attack runs for several dozen column inches but never directly mentions the near certain fact that many tens of thousands of non-combatants were killed. The article implicitly accepts that there were such levels of casualties, since it declares that "the raid was designed to attack an area of ten square miles" and later states that "the density of population is 100,000 to the square mile."⁶⁹ This item of public discourse, which was typical of the articles that appeared in American newspapers at the time, took no notice of the incineration of tens of thousands of civilians, indicating that public expectations at that time did not rule out such killing.

The power function of the norm may explain the public's expectations. The spectacle of such overwhelming force rained down on the enemy with impunity (the article dwelt at length on the fact that all three hundred B-52's returned safely to their bases) greatly reinforced the public's perception of America's strength and, in contrast to the memory of Pearl Harbor, its restored power and invulnerability.

American norms regarding airpower were dramatically different in January 1991 as is evident from public discourse concerning Operation Desert Storm. At that time, and to a heightened extent later during Operation Allied Force in 1999 over Kosovo, tremendous attention was paid to the avoidance of civilian casualties. Americans' collective understandings of the proper behavior of its

his description of a 17th century debate between Holland and England over the legitimacy of attacks on merchant ships at sea. Howard explained that the merchant Dutch were highly reliant on freedom of trade for their prosperity while the British, with their growing naval power, depended heavily on blockades and commerce raiding. Consequently the Dutch championed norms and laws that would hold commercial shipping inviolate while the British promoted arguments that found attacks on commerce morally and legally acceptable. Howard showed the British view prevailed, and it prevailed increasingly as British naval power became more dominant. See Michael Howard, "Temperamenta Belli: Can War Be Controlled?" In *Restraints on War: Studies in the Limitation of Armed Conflict*, edited by Michael Howard (Oxford: Oxford University Press, 1979), pages 8 through 10.

⁶⁷ McElroy, Robert W. *Morality and American Foreign Policy: The Role of Ethics in International Affairs* (Princeton: Princeton University Press, 1992.)

⁶⁸ Thomas, page 60.

⁶⁹ *The New York Times*, 10 March 1945, page 1.

military reflected a desire for near-perfect respect for the safety of noncombatants. Much attention focused on the gun camera videos which dramatically showed the unprecedented and extraordinary precision of what were called at the time "smart bombs." No attention was paid to the fact that in 1945, in what had come to be called "The Good War," the newly named "Greatest Generation" had behaved by standards that would in 1991 be considered grossly criminal.

The moral strand of the norm was greatly reinforced by the contingent strand of the norm. Americans seemed to take great satisfaction from the fact that in 1991 they alone could perform these feats of precision warfare. In fact, the norm briefly granted the United States a *de facto* monopoly on the legitimate use of force from the air. Under the collective understandings of proper behavior that suddenly came to prevail, the United States alone was capable of delivering bombs and missiles with sufficient accuracy and discrimination. All the other countries, with their "dumb bombs" were morally inadequate by comparison.

American norms shifted again in September 2001 after the Al Qaeda attacks. One would expect the distortions of wartime caused by shock, anger, and dismay to overlay the moral impulse behind the norm, but in fact air power norms had been so greatly strengthened that when force was applied from the air in Afghanistan against Al Qaeda and the Taliban, it was accompanied by simultaneous drops of food and supplies.⁷⁰ The issue of what norms should apply was complicated by the fact that technological advances in precision guided munitions, real-time intelligence, swift information processing and excellent communications combined to transform force from the air into the functional equivalent of a sniper rifle with global range. The subsequent addition of remotely piloted vehicles was merely one more step in the transformation of American airpower from a crude, city-incinerating weapon to a subtle instrument for assassination.

Americans' collective expectations for proper behavior with regard to assassination have never been equivocal. Thomas Jefferson, who had a particular gift for enunciating American values, followed the Swiss philosopher Emmerich de Vattel who declared that assassination was "an infamous and execrable practice," and that "the sovereign who makes use of such execrable means should be regarded as an enemy of the human race."⁷¹ Jefferson himself wrote that "assassination, poison, perjury... All of these were legitimate principles in the dark ages which intervened between ancient and modern civilizations, but exploded and held in just horror in the 18th century."⁷² In the 19th century the Lieber Code was equally clear in its condemnation of assassination. It states in Section IX under the heading of "Assassination" that: "The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial... The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism."⁷³

⁷⁰ The dramatic contrast to the standards of 1945 was captured by the remark that this practice was like starting the Marshall Plan aid on D-Day.

⁷¹ Vattel is quoted in Thomas, page 58. We know from his records of his library that Jefferson owned a copy of Vattel's *Law of Nations*.

⁷² Quoted in Thomas, page 58.

⁷³ The Lieber Code of 1863 Correspondence, Orders, Report, and Return of the Union Authorities From January 1 to December 31, 1863 -- #7 O.R. -- Series III, Volume III [S#124]
<http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm#section> 9 (as of 24 March 2001.)

The contingent strand of the norm strongly reinforces the moral strand. As a possessor of great military resources, the United States traditionally has condemned assassination as the treacherous, vile tactic of a John Wilkes Booth or a Lee Harvey Oswald, and it has served its power interests in doing so.⁷⁴ America's covert experiments with assassination in the form of the Kennedy brothers' attempts on Castro and the Phoenix program in Vietnam caused great embarrassment when they were unearthed and examined in the hearings of the Church and Pike committees in both houses of Congress in 1975.

In the state of emergency following the September 11 attacks, President George W. Bush and CIA Director George Tenet started breaking the norm against assassination, but did so in secret. This represented an abrupt change in thinking on Tenet's part.⁷⁵ The norm had been clearly enunciated in a public setting by the US ambassador to Israel, Martin Indyk. Accurately stating US policy and in line with American discourse, Indyk declared "The United States government is very clearly on record as against targeted assassinations... they are extrajudicial killings, and we do not support that."

American practice with regard to assassination by drone strike has developed greatly since 2001. The technology has evolved in the direction of greater accuracy, miniaturization, improved sensors for the collection of intelligence and improved information processing for the analysis of communications and imagery. Drones are far greater in number and sophistication, reliance on them has increased exponentially and the trends for increased sophistication and reliance are clear. The trends with regard to American understandings and expectations of proper behavior are also quite clear, but should be stated.

In the first days following the September 11 strikes, the CIA stepped forward with quickly developed plans for special operations in Afghanistan supported by airstrikes with precision-guided munitions. The CIA was much quicker off the mark with executable plans than the Department of Defense. In the state of emergency that prevailed in those days, standard practices were quickly set aside and the CIA embarked on an unprecedented program of missile strikes from remotely piloted aircraft. That program operated and swiftly expanded without critical supervision from the White House or Congress. Indeed, very few persons in the White House or the House and Senate Intelligence Committees were aware of the significant details. The public had only the vaguest notion of its nature and public opinion offered no significant restraint.

The US military developed its own drone program months after the CIA undertook its program in a significantly different direction. While there is no publicly available doctrine to explain how individuals are placed on the CIA kill list, the US military, with experience in the use of precision guided munitions dating back to 1991, has been careful to review and legally substantiate its targeting standards. In contrast to CIA practice, the military has formulated and promulgated standard procedures for the review and testing of targeting information and intelligence. About 180 persons are "in the loop" in any drone strike and a target may be held under observation for hours before a strike occurs.

⁷⁴ Public discourse in Rome, another unrivaled military power, functioned the same way. Livy, Suetonius and Tacitus forcefully condemn assassination as "un-Roman" and inadmissible.

⁷⁵ "Before September 11th, the CIA, which had been chastened by past assassination scandals, refused to deploy the Predator for anything other than surveillance. Daniel Benjamin, the State Department's counterterrorism director, and Steven Simon, a former counterterrorism adviser, report in their 2002 book "The Age of Sacred Terror" that the week before Al Qaeda attacked the US George Tenet, then the agency's director, argued that it would be "a terrible mistake" for "the Director of Central Intelligence to fire a weapon like this." Jane Meyer, "The Predator War" in *The New Yorker*, 26 October 2009, p 6.

In this way, the military strikes have achieved standards of compliance with the laws of armed conflict higher than those achievable by strikes from manned aircraft. This is in part due to the fact that an F-18 pilot cannot be as patient as a drone pilot, does not have access to equally complete and rich streams of information as are available to drone pilots, and does not have as ample support from other reviewers.

Understanding the differing norms practiced by the CIA and the US military is necessary in the context of the shifting trends for target selection. When the United States began using drones for assassination in Afghanistan, the strikes were few and were aimed at high-level members of Al Qaeda and the Taliban. By late 2010 strikes became much more frequent and were aimed at much lower value targets. According to Greg Miller in the *Washington Post*, "CIA drone attacks in Pakistan killed at least 581 militants last year, according to independent estimates. The number of those militants noteworthy enough to appear on a US list of most wanted terrorists: two."⁷⁶ A practice that began in 2002 with a very few strikes on very high value al Qaeda targets had transformed into a practice of killing foot soldiers. It seems that the contingent strand of US norms regarding assassination has increasingly trumped the moral strand as the war in Afghanistan continues.

Conclusion

In complying with the law of armed conflict, the military program for drone strikes has also aligned its practices with American norms. The CIA practice, without comparable accountability, visibility, public review or other significant restraints may or may not respect American norms. Past experience as uncovered by such reviews as the Church and Pike committees would suggest that programs operating without substantial accountability are likely to vary widely from collective understandings of the proper behavior.

As the United States begins to withdraw from Afghanistan, it will naturally reassess the balance between the contingent and moral strands of its norms regarding assassination. Now that the former director of the CIA has become the current Secretary of Defense, and the former commander in the Afghan war has become the new Director of Central Intelligence, the two agencies will have a rare opportunity to compare the relative ethics and effectiveness of their drone programs. The contingencies of the September 11 attacks that launched the CIA program have passed. Since the US military is manifestly able to carry out the necessary drone strike missions, it would seem appropriate ten years later to terminate the CIA program and transfer its missions to the US military, which has demonstrated its ability to comply with the sort of normative oversight expected of a peacetime military.

⁷⁶ Greg Miller, "Increased US Drone Strikes in Pakistan Killing Few High-Value Militants" *The Washington Post*, 21 February 2011.